Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution permits the courts in one state to exercise personal jurisdiction over another state's legislatively-created Insurance Guaranty Association, where that Association has neither done business in the forum state nor expressly consented to suit there, and the Association is connected to the litigation only because one of its state's residents happens to be injured in the forum and one of its member insurers does business there.

2. Whether the adjudicatory process in the Court of Appeals, in which the decision was based on outside-the-record factual investigation and fact-finding by that Court, was so contrary to the accepted course of judicial proceedings as to warrant supervisory review.

LIST OF PARTIES

Louisiana Insurance Guaranty Association, Petitioner and Garnishee below.

Sherman J. Olivier, Respondent and Plaintiff below.

South Carolina Property and Casualty Insurance Guaranty Association, Garnishee below.

Alabama Insurance Guaranty Association, Garnishee below.

There are no parent companies or subsidiaries of the foregoing parties. Alabama Insurance Guaranty Association is not involved in the appeal. All parties to the appeal have previously filed Certificates of Interested Parties and Corporate Disclosure Statements in the Eleventh Circuit which remain correct.

There are two other parties which are no longer active in the case -- the insolvent employer Merritt Dredging Company, Inc. and Merritt's insolvent insurer, Midland Insurance Company. Petitioner believes Merritt and Midland have no interest in the outcome of the petition.

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The opinion of the Eleventh Circuit is reported as Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827 (11th Cir. 1992), and is set out as Appendix A. The original panel opirion, later vacated, is reported as Olivier v. Merritt Dredging Company, Inc., 954 F.2d 1553 (11th Cir. 1992) and is set out as Appendix B. The opinion of the District Court is not reported and is set out as Appendix C.

STATEMENT OF THE GROUNDS FOR JURISDICTION

This petition seeks review of a judgment of the Eleventh Circuit Court of Appeals. The date of the decision of the Eleventh Circuit sought to be reviewed is December 21, 1992. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1, set forth in Appendix D.

Various provisions of the statute creating and defining the role of the Louisiana Insurance Guaranty Association (as they existed at the time of the District Court proceedings), including La. Rev. Stat. Ann. §§ 22:1377, 22:1379, 22:1380, 22:1382, 22:1383, and 22:1386, all as set forth in Appendices E-J.

STATEMENT OF THE CASE

Sherman J. Olivier filed an action against Merritt Dredging Company, Inc. under the Jones Act and general maritime law in the United States District Court for the Southern District of Alabama. That Court had admiralty jurisdiction under 28 U.S.C. § 1333, and diversity jurisdiction also existed under 28 U.S.C. § 1332. Olivier sought to recover for personal injuries he sustained while employed by Merritt as a seaman and member of the crew of a vessel which was engaged in dredging operations on navigable waters in Alabama.

Merritt filed a bankruptcy petition in the United States Bankruptcy Court for the District of South Carolina, and Olivier's action against Merritt was stayed. That stay was later lifted to allow this case to proceed to determine the liability of Merritt and to recover insurance proceeds in the event that judgment was entered against Merritt.

In 1986, Midland Insurance Company ("Midland"), which provided Merritt with insurance coverage for the claims asserted by Olivier, was placed in liquidation pursuant to an order of liquidation entered by the Supreme Court of New York. Olivier's action was stayed because of the liquidation proceeding, but that stay was lifted subsequently.

Olivier's Jones Act claim against Merritt was tried in the District Court, a jury returned a verdict in favor of Olivier and against Merritt, and a judgment in the amount of $522,190.00, plus interest, was entered in favor of Olivier and against Merritt.

The Louisiana Insurance Guaranty Association (LIGA) is an unincorporated, non-profit association created by Louisiana statute. It exists to aid Louisiana persons and interests who are beneficiaries of the insurance coverage of insurers which have qualified to do business in Louisiana and thereafter become insolvent.

It derives revenue from a flat-rate assessment against all Louisiana-qualified insurers. Membership in LIGA is compulsory for such insurers, and the assessments are levied based on the premiums charged in Louisiana by member insurers. No variation in assessments occurs because of differences in the types of risks insured or the geographic scope of the members' operations. LIGA exercises no control or influence over its member companies' choices as to (a) what risks to insure or (b) in what other states to do business.

Merritt is (or was) a South Carolina corporation. It purchased Jones Act insurance from Midland through a Maryland broker. The policy premium was calculated based on Merritt's operations in several states, including Alabama but not including Louisiana. LIGA was paid no assessment based on that policy, though Midland was a LIGA member and did other business in Louisiana.

LIGA has no officers, agents, employees, facilities, telephones, or other assets in Alabama. LIGA has never designated an agent for service of process in Alabama and has never applied for authorization or been authorized to do business in Alabama.

After obtaining his judgment against Merritt, Mr. Olivier caused a garnishment to be issued by the District Court against LIGA. LIGA responded by denying personal jurisdiction, filing in support an affidavit setting out the facts repeated in the preceding paragraph. Plaintiff filed no counter-affidavit or other evidence in response.

On December 21, 1990, the District Court granted the motion to dismiss filed by LIGA on the ground that the Court lacked personal jurisdiction over LIGA. Olivier appealed to the Eleventh Circuit Court of Appeals and on March 6, 1992, a panel reversed, holding that personal

jurisdiction existed. LIGA petitioned for rehearing and rehearing en banc. On December 21, 1992, the panel vacated its prior opinion, issued a new opinion holding that personal jurisdiction existed, and denied en banc review.

Another garnishee, South Carolina Insurance Guaranty Association (SCIGA) was a party to the Eleventh Circuit appeal. SCIGA has filed an original and a supplemental certiorari petition, which are pending in this Court as docket number 91-1984.

ARGUMENT AND CITATION OF AUTHORITIES

1. This Court should grant certiorari pursuant to Rule 10.1(c) because the question of one state's jurisdiction over another state's insurance guaranty association is an important and recurring question of federal law, which has never been addressed by this Court, and which should be settled by this Court.

Each of the fifty states has established some form of insurance guaranty program, though the names and details of coverage vary somewhat from state to state. In general, all of the state programs are designed to protect local interests, and the possible coverage of each state's program is triggered by the presence of local property, a local insured, or a resident claimant. See Louisiana Rev. Stat. Ann. § 1379 (Appendix F).

Because of (1) the universality of multi-state business operations and (2) the daily occurrence of the residents of one state traveling to and working temporarily in other states, there are countless occasions on which a claim possibly covered under a given state's insurance

guaranty program may arise in another state. In each such instance, the possibility exists that the courts of the "occurrence" state will be called upon to decide the question of their jurisdiction over another state's guaranty entity. See Georgia Insurers Insolvency Pool v. Brewer, 602 So.2d 1264 (Fla. 1992) (no jurisdiction); Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d 310 (S.C. 1992) (jurisdiction); Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F. Supp. 94 (S.D.N.Y. 1989) (no jurisdiction), aff'd on other grounds, 896 F.2d 674 (2d Cir. 1990); Pitco Frialator v. Guaranty Fund Management Services, 590 N.Y.S. 2d 989 (Sup. Ct. Erie Co. 1992) (no jurisdiction).

Certain anomalies already exist because of the absence of a decision by this Court on the jurisdictional issue. For example, the Brewer and Senn Trucking cases cited immediately above each dealt with jurisdiction over the Georgia

Insurers Insolvency Pool. As a result of the conflicting holdings, the Georgia Pool can now be sued in South Carolina but not in Florida, though its status and its relationship with those states is identical. Similar inconsistencies are likely until this Court resolves the question.

Midland, the insolvent insurer involved in this case, was only one of 225 or more property and casualty insurers which became insolvent in the late 1980s. During the time of those insolvencies, the state guaranty associations assessed member companies more than $3 billion to fund the various guaranty programs. Since 1990, other major insolvencies have occurred.

In most states, the level of assessment against solvent insurers to fund the insolvency program is determined by the state insurance commissioner or the Association. See Louisiana Rev. Stat. Ann. §§ 1382 & 1383 (Appendix H and I). It is important for these state officers to

know, in making assessment decisions, whether their claims costs can be controlled by utilizing a corps of experienced in-state claims counsel or, on the other hand, whether they are exposed to claims litigation in all states, with the attendant drastic increase in claims costs.

Because of the history of insurer insolvencies, and the likelihood of similar failures in the future, the question of where litigation against a particular fund may permissibly occur, and therefore what courts will be shaping and defining a particular state fund's obligations, is of critical importance to the funds, their members, and their potential beneficiaries. Because of the importance of that issue, this Court should grant review in this case to settle the question.

2. This Court should grant certiorari pursuant to Rule 10.1(a) because the Eleventh Circuit has decided a federal question in conflict with a decision of the Florida Supreme Court and other courts on the same question.

The Eleventh Circuit determined that the activities and contacts of an insolvent insurer doing business in Alabama may be attributed to the Louisiana Insurance Guaranty Association so as to satisfy the minimum contacts requirement of due process. In Georgia Insurers Insolvency Pool v. Brewer, 602 So.2d 1264 (Fla. 1992), the Florida Supreme Court addressed a question certified to it by one of Florida's intermediate appellate courts. The question certified as being of great public importance was stated by the Florida Supreme Court as follows:

> Whether the conduct of an insolvent insurer doing business in Florida may be shifted to Georgia Insurers Insolvency Pool so as to satisfy the minimum contacts requirement of the due process clause and vest jurisdiction by the Florida courts over the Georgia Insolvency Pool under Section 48.193, Florida statutes?

602 So.2d at 1265. The Florida Supreme Court reviewed the federal due process issue and unanimously determined that Florida's courts could not constitutionally exercise jurisdiction

over the Georgia Pool. In doing so, the Florida Supreme Court expressly acknowledged but "cho[se] not to follow the rationale" of the original panel opinion in this case. Id. at 1268 n.7. Though the parties and underlying facts differ, the decisions in Olivier and Brewer address precisely the same constitutional issue and precisely the same legal arguments, and reach conflicting results, as have other decisions cited in Part 1 above.

3. The Court should grant certiorari pursuant to Rule 10.1(c) because the decision of the Court of Appeals conflicts with applicable decisions of this Court.

The Fourteenth Amendment to the U.S. Constitution, as interpreted by this Court, forbids bringing a civil defendant into a suit in a foreign jurisdiction unless that defendant has certain minimum contacts with the forum or has consented to suit there. International Shoe Co. v. Washington, 326 U.S. 310 (1945). This Court has determined that "all assertions of

state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The decision of the Eleventh Circuit directly conflicts with those standards.

a. There are no minimum contacts between LIGA and the forum. The minimum contacts principles flowing from International Shoe were reviewed and summarized by this Court in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985):

> . . . . "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation, the Court frequently has drawn from the reasoning of Hanson v. Denckla, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958):
>
> > "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.

> The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law."
>
> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

471 U.S. at 474-76 (citations and footnotes omitted; emphasis in original).

Similarly, in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) the Court stated:

> The "substantial connection" . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.

480 U.S. at 112 (citation omitted; emphasis in original).

In the present record there is no evidence whatsoever of any activity directed toward Alabama residents by LIGA. The affidavit submitted by LIGA on the jurisdiction question established, prima facie, that LIGA has done no business in Alabama, has no offices, employees, assets, property, or service agent in Alabama and has never been authorized to do business in Alabama. Nothing filed by Mr. Olivier contested that affidavit, and no affidavit or other evidence was submitted by Mr. Olivier in support of a claim that LIGA actually has any Alabama presence.

In reality, neither in the District Court nor in the Eleventh Circuit did Mr. Olivier attempt to demonstrate that LIGA itself has any contacts with Alabama. Instead, Mr. Olivier advanced, and the Eleventh Circuit accepted, the proposition that the District Court would have had jurisdiction over Midland, the insolvent insurer. Mr. Olivier then asserts that LIGA "stands in the shoes" of Midland for all purposes, including personal jurisdiction. No case authority was offered, and the entire premise of the argument (at least to the extent that the argument was based on the record -- see Part 4 below) is the portion of the LIGA statute declaring that LIGA is deemed to be the insurer with respect to covered claims. La. Rev. Stat. Ann. § 22:1382 (Appendix H).

In order to appreciate this argument fully, it is important to note that under the LIGA Act, a "covered claim" includes unpaid claims of certain types under a policy issued by an

insolvent Louisiana-authorized insurer where (a) the claimant or insured is a Louisiana resident or (b) the property involved in the claim was permanently located in Louisiana. Id. § 22:1379(3) (Appendix F). No Louisiana property or insured is involved in this case, and Mr. Olivier's claim may arguably be "covered" only because he is alleged to be a Louisiana resident, though he was injured in Alabama. Mr. Olivier's position is simple -- jurisdiction over LIGA follows covered claims. Under that theory of personal jurisdiction, LIGA can be sued in any state in which any of Louisiana's wayfaring residents happen to be injured. No act, conduct or contract by LIGA is needed to give rise to this jurisdiction: So long as a Louisianan is hurt in a particular state, the LIGA Act authorizes a suit against LIGA there.

Mr. Olivier's minimum contacts argument is, in reality, based on nothing beyond naked

foreseeability. It was certainly foreseeable, in the "anything can happen" sense, that a Louisianan could be hurt while working in Alabama for a South Carolina employer whose Jones Act insurance was written by an insurer which became insolvent. In the same way it is foreseeable that a car sold by a New York retailer could be involved in an accident in Oklahoma, or that a tire valve manufactured in Japan could fail on a motorcycle tire in California. But of course that type of foreseeability has been firmly rejected as a basis for personal jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Industry Co. v. Superior Court, supra. The Eleventh Circuit's misapplication of this Court's minimum contacts jurisprudence must be corrected.

The Eleventh Circuit relied on McGee v. International Life Insurance Co., 355 U.S. 220 (1957), stating broadly that McGee establishes

that "a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts." 979 F.2d at 833. In McGee, the defendant insurer was sued in California on a life policy. The defendant had in 1948 "mailed a reinsurance certificate to [the insured] in California offering to insure him. . . . He accepted this offer and from that time until his death in 1950 paid premiums by mail from his California home. . . ." 355 U.S. at 221-22. Thus McGee stands for the hardly remarkable proposition that an insurer which 1) solicits a piece of business in a state, 2) issues a policy to a resident of that state, and 3) receives premiums from that state, is subject to suit in that state. McGee involves obvious "purposeful availment," and the insurer's relationship with the California forum there is completely distinguishable from LIGA's relationship to Alabama.

b. There is no consent. "Consent" is of course a valid basis for a state's exercise of personal jurisdiction, since the constitutional requirements for personal jurisdiction may be "intentionally waived." Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982). The Eleventh Circuit pointed to no contract by which LIGA consented to be sued in Alabama, and pointed to no act, such as designating a service agent in Alabama, from which consent is sometimes inferred. Instead, the "consent" is said to arise from the legislative act creating LIGA and from the Eleventh Circuit's fact-finding regarding the "history" of similar acts.

The Court's conclusion is fairly striking on its face -- that in creating a body operating under the supervision of the Louisiana insurance commissioner to protect Louisiana insureds and residents, the Louisiana legislature intended

that the body be subject to suit nationwide. While that proposition is not impossible, it is certainly so doubtful that some clear evidence to support it must be identified in the Act.

Nothing in the LIGA statute can reasonably be construed as a consent to suit outside of Louisiana. The statute does provide that LIGA may "sue or be sued," La. Rev. Stat. Ann. § 22:1382(2)(c) (Appendix H), but that section says nothing about being sued out-of-state. The most direct provision regarding place of suit is § 22:1380 (Appendix G) which provides that LIGA's "domicile for purpose of suit shall be East Baton Rouge Parish, Louisiana." In the absence of any clearer legislative statement, that section appears to define expressly and exclusively where the State of Louisiana intended that LIGA may be sued.

The mandate of § 22:1382(1)(b) that "to the extent of its obligations on the covered claims" LIGA assume the "obligations" of an insolvent

insurer obviously addresses financial obligations. The preceding subsection, 22:1382(1)(a), speaks of such "obligations" in terms of dollar exposure. Nothing in § 22:1382(1)(a) or (b) indicates the Louisiana legislature intended that LIGA, in assuming an insurer's financial obligations, would also be subject to suit wherever the insurer might be found. No "waiver" of LIGA's due process rights can reasonably be inferred from this provision.

Perhaps the clearest statutory expression of the absence of consent to foreign suit against LIGA is found in § 22:1386(2) (Appendix J), which recognizes situations like the present case in which a claim may be covered in part by more than one state's insurance guaranty law. That section provides:

> (2) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location,

> he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this Part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

Id. § 22:1386(2) (emphasis added). Thus the statute recognizes multiple state association liability, but rejects a joint collection action of the type attempted here. The LIGA statute defines the priority of liability of associations, and requires that a claimant "seek recovery first" from specified associations under specified circumstances. If foreign jurisdiction and foreign multiple-association collection actions were contemplated, a claimant would not be required to "seek recovery first" from any particular plan, since he could sue them all simultaneously. This section in the statute cannot remotely be construed as an agreement by LIGA to be sued in Alabama and in

fact implies that only local suits are contemplated.

The Eleventh Circuit ignored the status, conduct, and contacts of LIGA itself in finding consent to personal jurisdiction. Instead, it focused on "the insurance industry." The dispositive holding of the Court is this:

> In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be haled into the same courts where their insolvent members would have been subject to the reach of due process. Thus, SCIGA and LIGA consented to service of process in Alabama in this case.

979 F.2d at 833. The factual validity of that statement is addressed in Part 4 below. As a legal proposition it is truly breathtaking: For due process analysis, LIGA's status as a local Louisiana entity, created by Louisiana law, governed by the Louisiana insurance commissioner, and with no extraterritorial contacts, is totally irrelevant. All that matters is that

LIGA is somehow connected to "the insurance industry" and therefore may be sued wherever insurance business is transacted. This proposition obliterates all previous minimum contacts analysis.

In truth, the sole basis for the Eleventh Circuit's finding of "consent" is its own independent fact-finding discussed in Part 4 below. Absent that, the conclusion that LIGA has intentionally waived its constitutional protection against suit in a forum with which it has no contacts is wholly unsupported.

4. This Court should grant certiorari pursuant to Rule 10.1(a) because, in basing its decision on facts it found from matters outside the record, the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The factual record in this case is very, very meager. When Mr. Olivier sought writs of garnishment against LIGA and SCIGA, each association responded with affidavits demonstrating the

absence of any actual contacts between the associations and the state of Alabama. Mr. Olivier made no evidentiary response whatsoever. No other evidentiary proceedings occurred in the District Court. In particular, there was no factual inquiry in the District Court regarding the history of any state guaranty program, the funding history of any program, the relationship between state associations generally and the insurance industry, or the historical relationship among the various state legislatures, national insurers, and the state insurance commissioners or their association, the National Association of Insurance Commissioners (NAIC).

On appeal, the Eleventh Circuit panel apparently decided that the factual matters identified in the preceding sentence were dispositive of the issues raised in the case. Without any participation by the parties, the Court made its own factual investigation into

these matters, and premised its decision on the results of that investigation.

In its introductory passages summarizing its decision, the Court stated:

> We find under the interstate arrangements made by the insurance industry to protect policyholders from losses resulting from the insolvency of an industry member, LIGA and SCIGA consented to be subject to the same personal jurisdiction as one of their insolvent members . . . .

979 F.2d at 829 (emphasis added). There is nothing in the record relating to any interstate arrangements made by the insurance industry.

Later, in its review of the facts, the Court stated:

> Insurance guaranty associations were formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund.

Id. There is nothing in the record about federal legislation, a federal guaranty fund, or any concerted activity by insurance companies to avoid such legislation.

In rejecting LIGA's due process arguments, the Court stated:

> A member of the association, acting within the framework of the Interstate compact who becomes insolvent, automatically makes the association the alter ego of that failed member.

Id. at 832 (emphasis added). There is nothing in the record relating to any "Interstate compact."

In addressing LIGA's arguments regarding foreseeability, the Court stated:

> In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be haled into the same courts where their insolvent members would have been subject to the reach of due process.

Id. at 833 (emphasis added). There is nothing in the record regarding federal legislation. More importantly, there is nothing in the record supporting the Court's finding that in passing the act creating LIGA, the men and women of the

Louisiana legislature were simply acting as tools of "the insurance industry."

All of the Eleventh Circuit's findings regarding "the insurance industry" and the avoidance of federal legislation are premised on a single published article quoted at 979 F.2d 829-830 and identified in footnote 1 of the Eleventh Circuit's opinion. This publication was not cited to that Court by any party and LIGA was given no opportunity to challenge the historical accuracy of its contents or to explain that the impetus for the model post-insolvency act came not from "the insurance industry" but from the state insurance commissioners -- the state officers who regulate the insurance industry.

In some circumstances, of course, an appellate court's straying from the record to find general background information is harmless. It is quite clear in this case, however, that the fundamental premise for the

Eleventh Circuit's decision was its conclusion that "the insurance industry" impelled the legislative creation of each state fund and therefore, because of the interstate character of insurance business, no one should be troubled by multi-state suit exposure.

This Court has dealt previously with circumstances in which courts of appeals attempt to engage in the fact-finding functions which are by law reposed in the trial courts. In Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986), this Court gave its direction to the courts of appeals in such situations:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it should have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it

> should not simply have made factual findings on its own.

475 U.S. at 714.

In Icicle Seafoods, there existed a factual record in the District Court regarding important factual issues. The Ninth Circuit's error was in reinterpreting the evidence in violation of Rule 52(a). In this case, the Eleventh Circuit's error is more egregious. That Court apparently determined that historical facts regarding the relationship of "the insurance industry" to the creation of state guaranty funds were dispositive, but there was nothing in the record relating to that history. Instead of defining the controlling legal principles and then remanding to the District Court for appropriate fact-finding, the Court of Appeals here went entirely outside the record, conducted its own factual inquiry, and based its decision on the result of that inquiry, without any participation by the parties or the District Court. In doing so, it engaged in a gross

departure from the accepted and usual course of judicial proceedings, as established in Icicle Seafoods and otherwise, to the great prejudice of the garnishment defendants. This Court should exercise its powers of supervision to correct this fact-finding adventure by the Court of Appeals.

CONCLUSION

The petition presents a recurring question of national importance. The Court of Appeals reached a result in conflict with the principles of prior decisions of this Court and did so through a process foreign to the normal judicial process. The petition for certiorari should be granted.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX OF PETITIONER (Volume 1)

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Appendix A

SHERMAN J. OLIVIER, Plaintiff-Appellant,

v.

MERRITT DREDGING COMPANY, INC., et al., Defendants,

Louisiana Insurance Guaranty Association; South Carolina Property and Casualty Insurance Guaranty Association, Defendants-Appellees.

United States Court of Appeals, Eleventh Circuit.

December 21, 1992.

Appeal from the United States District Court for the Southern District of Alabama.

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Before JOHNSON*, CLARK and PECK**, Senior Circuit Judges.

JOHN W. PECK, Senior Circuit Judge:

Our previous opinion in this case appearing in 954 F.2d 1553 (Marcn 6, 1992), is vacated and withdrawn. The petitions for rehearing and

for rehearing en banc are DENIED. The panel, having been requested by a member of the court in regular active service to reconsider the opinion, has done so and reissues our modified opinion reversing the decision of the district court. No judge on active service has requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5).

Sherman J. Olivier, a resident of Louisiana and a seaman injured aboard a vessel in Alabama, appeals the dismissal of writs of garnishment issued to the Louisiana Insurance Guaranty Association [LIGA] and the South Carolina Property and Casualty Insurance Guaranty Association [SCIGA]. The district court in Alabama dismissed the writs on the ground that the court lacked personal jurisdiction over the garnishees. The court held that LIGA and SCIGA did not have

sufficient minimum contacts with Alabama in order to be subject to personal jurisdiction within the state. We find under the interstate arrangements made by the insurance industry to protect policyholders from losses resulting from the insolvency of an industry member, LIGA and SCIGA consented to be subject to the same personal jurisdiction as one of their insolvent members, and we believe that judicial economy would best be served by keeping this litigation within that forum. Therefore, we reverse the district court's order.

I. FACTS

On August 1, 1983 Sherman J. Olivier sustained personal injuries while employed by the Merritt Dredging Company [Merritt] as a sailor aboard a vessel in Alabama on the Alabama River. At the time of his injuries, Olivier was a resident of Louisiana. Merritt

was a South Carolina corporation with its principal place of business in South Carolina.

On March 30, 1984 Merritt filed for bankruptcy in South Carolina. In order to protect the bankruptcy estate, the bankruptcy court temporarily stayed the personal injury suit Olivier had brought against Merritt in Alabama. The bankruptcy court lifted its stay on September 26, 1985.

To provide insurance for its various operations including its activity in Alabama, Merritt contracted with the Midland Insurance Company [Midland]. Like Merritt, Midland faced financial difficulties. On April 3, 1986 Midland, a New York corporation, was liquidated pursuant to an order of the Supreme Court of New York. The liquidation proceedings once again stayed Olivier's personal injury suit against Merritt.

The second stay was lifted on May 22, 1987. In December 1988 a jury in Mobile,

Alabama awarded Olivier $507,340.00. On February 14, 1989 Olivier received a judgment against Merritt of $522,190.00, interest from the date of the judgment, and costs.

Due to the insolvency of both Merritt and its insurer, Midland, Olivier requested that the district court in Alabama issue writs of garnishment to LIGA, SCIGA, and the Alabama Insurance Guaranty Association [AIGA]. On July 21, 1989 the district court issued the writs.

AIGA, LIGA, and SCIGA are unincorporated associations created by state statutes. *See* Ala. Code §§ 27-42-1 *et seq.* (1975). La. Rev. Stat. Ann. §§ 22:1375 *et seq.* (West Supp. 1991), S. C. Code Ann. §§ 38-31-10 *et seq.* (Law. Co-op. 1976). The AIGA writ is not at issue in this appeal. Insurance guaranty associations were formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund.

In 1966, Senator Thomas Dodd (D. Conn.) focused public attention on the problems created by a growing number of insurance company insolvencies. He released a study on the insolvencies of substandard automobile insurance companies, and introduced Senate Bill 3919 (the 'Dodd Bill') to establish a Federal Motor Vehicle Insurance Guaranty Corporation. The Dodd Bill was designed to protect automobile insurance policyholders and claimants in a manner similar to the protection afforded bank depositors by the Federal Deposit Insurance Corporation. 112 Cong. Rec. 27311 (1966).

* * * * * *

The insurance industry has been historically opposed to the guaranty fund concept. In an effort, however, to avoid federal legislation and the intrusion of the federal government into regulation for solvency, the NAIC swiftly drafted and adopted a model post-insolvency assessment fund bill (the 'Model Act') providing for individual state guaranty funds. The Model Act covered all insurance lines, except life, accident, health, title, credit and mortgage guaranty insurance. While the NAIC and virtually the entire property and casualty industry joined in advocating the passage of this defensive legislation, the American Insurance Association and the State Farm Companies did not initially lend their

> support for a state-by-state enactment of guaranty fund protection. The American Insurance Association, however, later helped draft the NAIC Model Act.
>
> The Magnusson Bill [a substitute for the 'Dodd Bill'] died in the face of the NAIC Model Act, and variations of the Model Act were adopted in all states. Currently, post-insolvency assessment Insurance Guaranty Funds for property and liability insurance exist in Puerto Rico, the Virgin Islands, the District of Columbia, and every state except New York (New York has had a form of pre-insolvency assessment Insurance Guaranty Fund since 1947).[1]

The Insurance Guaranty Fund law does not establish a special private corporation. Rather, an Insurance Guaranty Fund is a public or quasi-public corporation. It is a legislatively declared "mechanism" to aid and benefit losses due to the insolvency of their insurers. It fills a public need without profit to any organizers or stockholders. *O'Malley v. Florida Insurance Guaranty Association, et al.*, 257 So. 2d 9, 11 (Fla.

1971). The statutory purpose of the Insurance Guaranty Fund law is to place claimants in the same position they would have been in if the insurer had not become insolvent. *Lucas v. Illinois Insurance Guaranty Fund*, 52 Ill.App.3d 237, 10 Ill. Dec. 81, 83, 367 N.E.2d 469, 471 (1978).

II. DISCUSSION

A. *Alabama Long-Arm Jurisdiction*

[1, 2] This circuit conducts *de novo* review of a district court's dismissal of an action for lack of personal jurisdiction. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). We begin our inquiry into whether the district court properly refused to assert personal jurisdiction with a two-part analysis. First, we consider whether the district court could obtain personal jurisdiction over the defendants pursuant to

the applicable state long-arm statute. Second, we consider whether the exercise of personal jurisdiction would violate the due process clause of the Fourteenth Amendment to the United States Constitution.

In interpreting the reach of the state's long-arm statute, the Supreme Court of Alabama has extended the jurisdiction of Alabama courts to the extent permissible under the due process clause of the Fourteenth Amendment. *See Alabama Waterproofing Co., Inc. v. Hanby*, 431 So. 2d 141, 145 (Ala. 1983); *Sells v. International Harvester Co., Inc.*, 513 F.2d 762 (5th Cir. 1975). Thus, in order to determine whether the district court in Alabama properly refused to exercise personal jurisdiction, we need only consider whether the exercise of jurisdiction would have satisfied the requirements of due process.

B. *Due Process*

[3] The determination of whether a district court can exercise personal jurisdiction over a non-resident defendant is itself a two-part inquiry. In the first prong of our due process inquiry, we consider whether the defendants, LIGA and SCIGA, standing in the shoes of the insolvent insurer, engaged in minimum contacts with the State of Alabama. In the second prong of our inquiry, we consider whether the exercise of personal jurisdiction over the defendants would offend "traditional notions of fair play and substantial justice." *Madara*, 916 F.2d at 1516 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95 (1945)).

1. Minimum Contacts

In analyzing the parties' arguments we are guided by the language of several Supreme Court

opinions. As the Supreme Court has stated:

> [M]inimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute, and the process of resolving potentially conflicting "fundamental substantive social policies" can usually be accommodated through choice-of-law rules rather than through outright preclusion of jurisdiction in one forum. (citations omitted)

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483 n.26, 105 S. Ct. 2174, 2188 n.26, 85 L.Ed.2d 528 (1985) (citations omitted).

In 1989 Olivier, a resident of Louisiana, received a judgment in Alabama (the place where he sustained his injuries) against Merritt, a South Carolina corporation. Olivier contends that the judgment entitled him to proceed in Alabama against Merritt's bankrupt insurer, Midland. This would be undoubtedly correct but for the bankruptcy of Midland. Alabama law respecting its long-arm statute states:

(a) Basis for Out of State Service.

> (2) SUFFICIENT CONTACTS. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's:
>
> > (G) Contracting to insure any person, property, or risk located within this state at the time of contracting.[2]

Olivier maintains that his claim is a "covered claim" within the meaning of the Louisiana and South Carolina statutes governing the respective state insurance guaranty associations. Midland insured Merritt, a resident of South Carolina and a beneficiary of the SCIGA; Olivier was a resident of Louisiana and a beneficiary of the LIGA at the time of the insured event. *See* La. Rev. Stat. Ann. § 22:1379(3)(a),[3] S. C. Code Ann. § 38-31-20(6).[4]

Furthermore, Olivier argues that since his claim is a "covered claim," according to the respective statutes, LIGA and SCIGA are deemed

insurers to the extent of Midland's obligations. *See* La. Rev. Stat. Ann. §§ 22:1382 A(1) and (2),[5] S. C. Code Ann. §§ 38-31-60(a) and (b).[6] We agree with Olivier's position.

Olivier contends that Midland is subject to personal jurisdiction in Alabama because it provided insurance coverage for Merritt for accidents that occurred while operating its vessels in Alabama waters. By guaranteeing payment of Midland's policies that provided insurance for claimants who are state residents or insureds who are state residents, Olivier contends LIGA and SCIGA should reasonably have foreseen that they would be subject to suit in other jurisdictions. Olivier claims that the statutes, which place LIGA and SCIGA in the position of an insolvent insurer, impose affirmative, extraterritorial obligations upon them. Because Midland is subject to personal

jurisdiction in Alabama, both LIGA and SCIGA are subject to personal jurisdiction in Alabama. Olivier argues that LIGA's and SCIGA's statutory obligations establish minimum contacts with Alabama sufficient to justify the district court's exercise of personal jurisdiction over them.

As mere creations of their respective state statutes, LIGA and SCIGA claim they have not purposefully directed any activity toward the State of Alabama. Neither LIGA nor SCIGA maintains any offices or agents in Alabama. The associations contend that Midland's contacts with Alabama are not at issue since personal jurisdiction is not being sought after Midland, but after LIGA and SCIGA. LIGA and SCIGA claim that they will be denied due process if they are subject to legal liability in Alabama on account of the unilateral activity of a third party -- Midland. We

interpose that it is our view that Midland's activity was not unilateral. Midland was a member of SCIGA. The record is silent as to whether Midland was a member of LIGA, but we assume it was since LIGA did not raise this as a defense. A member of the association, acting within the framework of the Interstate compact who becomes insolvent, automatically makes the association the alter ego of that failed member.

In addition, LIGA and SCIGA argue that although it might have been foreseeable that the associations could become involved in litigation in Alabama, such foreseeability alone is insufficient to confer personal jurisdiction. LIGA and SCIGA maintain that foreseeability is only one factor to be considered in an analysis of a defendant's minimum contacts with a forum.

LIGA and SCIGA note that neither of the state insurance guaranty acts specifically

authorize suit against an insurance guaranty association outside the state which created the association. The associations argue that this conspicuous absence indicates that it was not the intent of the state legislatures to permit LIGA and SCIGA to be subject to suit in other jurisdictions.[7]

In support of their arguments, LIGA and SCIGA rely upon the reasoning of the district court in *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n.*, 715 F.Supp. 94, 97 (S.D. N.Y. 1989), *aff'd on other grounds*, 896 F.2d 674 (2nd Cir. 1990). We are not persuaded by the court's reasoning in *Rhulen*. Indeed, we believe the district court decision concerning personal jurisdiction over AIGA and other state insurance guaranty associations is entitled to no weight since the Second Circuit held that the district court lacked subject matter jurisdiction; this holding precluded any

consideration of the existence of personal jurisdiction over the defendants. *Rhulen*, 896 F.2d at 675-676.

For the reasons outlined below, we believe Olivier has the superior argument. In the seminal case, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, the Supreme Court of the United States held that the due process clause of the Fourteenth Amendment requires that a defendant be subject to the personal jurisdiction of the court. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L.Ed.2d 490 (1980). Thus, we recognize that even if the forum state is the most convenient location for litigation, the due process clause may act to divest a state's courts of the power to render a valid judgment if a defendant does not have the requisite minimum contacts with the forum. *World-Wide Volkswagen*, 444 U.S.

at 294, 100 S. Ct. at 566; *Hanson v. Denckla*, 357 U.S. 235, 251, 254, 78 S. Ct. 1228, 1238, 1240, 2 L.Ed.2d 1283 (1958).

[4] The Supreme Court has opined that the due process clause of the Fourteenth Amendment requires that defendants have "fair warning" that particular activities may subject them to the jurisdiction of foreign sovereigns. *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182. One of the considerations important in assessing whether or not a defendant has fair warning is the foreseeability of suit within the jurisdiction. The foreseeability that is critical in an analysis of minimum contacts is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567. In attempting to define when a defendant should reasonably

anticipate being haled into court, the Supreme Court has stated: ". . . there must be some act by which the defendant purposefully availed itself of conducting activities within the forum state." *Hanson*, 357 U.S. at 253, 78 S. Ct. at 1239-1240. This requirement exists to ensure that a defendant will not be subject to legal liability in a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183.

[5] In the instant case, LIGA and SCIGA are subject to legal liability in Alabama neither on account of random contacts nor on account of the unilateral activity of Midland Insurance. In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be haled into

the same courts where their insolvent members would have been subject to the reach of due process. Thus, SCIGA and LIGA consented to service of process in Alabama in this case.

LIGA and SCIGA guaranteed payment of "covered claims." *See* La. Rev. Stat. Ann. § 22:1379(3)(a), S. C. Code Ann. § 38-31-20(6). The "claimant," Olivier, was a Louisiana resident and he has a colorable claim. The "insured," Merritt, was a South Carolina corporation and it has a colorable claim. Not only did LIGA and SCIGA guarantee payment of "covered claims," but they also assumed all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. *See* La. Rev. Stat. Ann. § 22:1382 A(2), S. C. Code Ann. § 38-31-60(b). By the language of the statutes that govern LIGA and SCIGA, we conclude that these associations had fair warning that they could

be subject to suit for "covered claims" in jurisdictions outside of their respective states.

[6] Midland insured Merritt's operations in Alabama. Since the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L.Ed.2d 223 (1957), it has been the law that a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts. LIGA and SCIGA, by standing in Midland's shoes, also have consented to jurisdiction in the state's courts.

Our decision in this case is bolstered by a South Carolina Supreme Court opinion which was issued after our initial opinion was filed. In *Bell v. Senn Trucking Co. of Newberry*, 418 S.E.2d 310 (S.C. 1992), the court stated the following:

The Georgia Pool first asserts that it is not amenable to suit in South Carolina under the South Carolina long-arm statute, S. C. Code Ann. § 36-2-803 (1976). We disagree. South Carolina's long-arm statute provides that a court may exercise personal jurisdiction over a person who contracts to insure any person, property or risk located in South Carolina at the time of contracting. S. C. Code Ann. § 36-2-803(1)(f)(1976). Anglo-American is subject to in personam jurisdiction in South Carolina because it contracted with Senn of Georgia to insure a risk in South Carolina. The Georgia legislature requires the Georgia Pool to assume the obligations of an insolvent insurer in regard to covered claims for a specified period following the date an insurer is determined to be insolvent. Ga. Code Ann. § 33-36-9 (1990). The Georgia Pool is "deemed to be the insurer for such period with respect [to] and to the extent of the claims with all the rights, duties, and obligations of the insolvent insurer . . . ." Id. Moreover, as a condition of doing business in Georgia, an insurer is deemed to have appointed the Georgia Pool as its agent with respect to the investigation, adjustment, compromise, and settlement of covered claims in the event the insurer becomes insolvent. Id. § 33-36-13.

Based on the plain language of the Georgia Code, once Anglo-American

> became insolvent, the Georgia Pool became subject to the jurisdiction of the courts of this State as Anglo-American's alter-ego and agent. We find that the trial judge did not err in holding that the Georgia Pool is subject to in personam jurisdiction in South Carolina.

418 S.E.2d at 311-12.

We conclude that the associations' obligations to defend suits in other jurisdictions would not be unduly burdensome. Indeed, both LIGA and SCIGA may alleviate the cost of litigation in other jurisdictions by adjusting their insurance assessments. Or if the expenses are too great, they have the option of altering their obligations and coverage for claims. *Cf.* ***World-Wide Volkswagen***, 444 U.S. at 297, 100 S. Ct. at 567.

2. Fair Play and Substantial Justice

[7] Once a court has decided that a defendant has established minimum contacts within a forum state, these contacts may be

considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184. As the Supreme Court has stated, other factors may serve to establish the reasonableness of personal jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King*, 471 U.S. at 477, 105 S. Ct. at 2184. Some of these factors include: the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.*

In addition, as the Supreme Court of the United States has noted ". . . modern

transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee*, 355 U.S. at 222-223, 78 S. Ct. at 201. The Supreme Court subsequently stated that the historical developments noted in *McGee* have only accelerated in the generation since that case was decided. *World-Wide Volkswagen*, 444 U.S. at 293, 100 S. Ct. at 565. Requiring adjudication in Alabama will not impose a substantial burden on LIGA and SCIGA.

It would be unduly burdensome, however, to require Olivier to seek coverage for his claim from LIGA in Louisiana courts and from SCIGA in South Carolina courts. Such a requirement would spread thin his resources and would hamper Olivier's ability to obtain quick, convenient, and effective relief. *See McGee*, 355 U.S. at 228, 78 S. Ct. at 201. Indeed, it

would frustrate the very purposes of the state insurance guaranty associations. *See e.g.*, La. Rev. Stat. Ann. § 22:1376. Furthermore, a requirement that Olivier sue in both Louisiana and South Carolina would pose an unnecessary waste of precious judicial resources. Separate litigations do not necessarily insure fairness; in this case they would inhibit it.

III. CONCLUSION

For the reasons stated above, we REVERSE the order of the district court and REMAND the case for further proceedings consistent with this opinion.

FOOTNOTES

* *See* Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

** Honorable John W. Peck, Senior U. S. Circuit Judge for the Sixth Circuit, sitting by designation.

1 Linda M. Lasley, Patricia Winters, and Debra R. Puebla, *Insurance Guaranty Funds: The New 'Money Pit'?*, 416 Practicing Law Institute, Comm. 113 (March 1, 1987).

2 Alabama Rules of Civil Procedure 4.2(a)(2)(G).

3 The text of this section after amendments in 1987 does not differ materially from the text as it existed at the time of Olivier's accident and the date of insolvency of Midland Insurance. The current text reads as follows:

> "Covered claim" means an unpaid claim, including one for unearned premiums by or against the insured or agent, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Part applies issued by an insurer, if such insurer becomes an insolvent insurer after September 1, 1970, and (i) The claimant or insured is a resident of this state at the time of the insured event; or (ii) The property from which the claim arises is permanently located in this state.

[4] For the sake of brevity, where the South Carolina statutes governing SCIGA do not contain any important differences from the Louisiana statutes governing LIGA, we have omitted from this opinion the texts of the South Carolina statutes.

[5] The relevant portions of these sections read as follows:

> A. The association shall:
> (1)(a) Be obliged to the extent of the covered claims . . . .
>
> (2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and *obligations of the insolvent insurer as if the insurer had not become insolvent*. (Emphasis added)

[6] S. C. Code Ann. § 38-31-60(b) corresponds to La. Rev. Stat. Ann. § 22-1382 A(2). The first sentence of the paragraph in the South Carolina Code is virtually identical to its Louisiana counterpart. The South Carolina Legislature, however, added the following to paragraph (b) of § 38-31-60:

> However, the Association has the right but not the obligation to defend an insured who is not a resident of this State at the time of the insured event unless the property from which the claim arises is permanently located in this State in which instance the Association does have the obligation to defend the insured.

7 We think this argument borders on the specious. The intent of the legislature had to be to protect their citizens as either policyholders or victims of the insolvency of an insurance company. It must be remembered that this issue has arisen not because Merritt became insolvent but because Midland Insurance Company became insolvent. If Merritt had remained solvent, it would have had to pay the judgment but for the existence of the guaranty associations. The South Carolina Legislature intended to protect its citizens (such as Merritt) who were policyholders from such losses. In reaching our conclusion in this case, we disregard the bankruptcy of Merritt.

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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX OF PETITIONER (Volume 2)

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Appendix B

Sherman J. OLIVIER, Plaintiff-Appellant,

v.

MERRITT DREDGING COMPANY, INC., South Carolina Property and Casualty Insurance Guaranty Association, Louisiana Insurance Guaranty Association, Defendants-Appellees

No. 91-7078.

United States Court of Appeals, Eleventh Circuit.

March 6, 1992.

Appeal from the United States District Court for the Southern District of Alabama.

Before JOHNSON*, CLARK*, and PECK**, Senior Circuit Judges.

JOHN W. PECK, Senior, Senior Circuit Judge:

Sherman J. Olivier, a resident of Louisiana and a seaman injured aboard a vessel in Alabama, appeals the dismissal of writs of

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[Footnotes at page 38 et seq.]

garnishment issued to the Louisiana Insurance Guaranty Association [LIGA] and the South Carolina Property and Casualty Insurance Guaranty Association [SCIGA]. The district court in Alabama dismissed the writs on the ground that the court lacked personal jurisdiction over the garnishees. The court held that LIGA and SCIGA did not have sufficient minimum contacts with Alabama in order to be subject to personal jurisdiction within the state. Because we find that SCIGA and LIGA had sufficient minimum contacts with Alabama and we believe that judicial economy would best be served by keeping this litigation within that forum, we reverse the district court's order.

I. FACTS

On August 1, 1983 Sherman J. Olivier sustained personal injuries while employed by the Merritt Dredging Company [Merritt] as a

sailor aboard a vessel in Alabama on the Alabama River. At the time of his injuries, Olivier was a resident of Louisiana. Merritt was a South Carolina corporation with its principal place of business in South Carolina.

On March 30, 1984 Merritt filed for bankruptcy in South Carolina. In order to protect the bankruptcy estate, the bankruptcy court temporarily stayed the personal injury suit Olivier had brought against Merritt in Alabama. The bankruptcy court lifted its stay on September 26, 1985.

To provide insurance for its various operations including its activity in Alabama, Merritt contracted with the Midland Insurance Company [Midland]. Like Merritt, Midland faced financial difficulties. On April 3, 1986 Midland, a New York corporation, was liquidated pursuant to an order of the Supreme Court of New York. The liquidation proceedings once again stayed Olivier's personal injury suit

against Merritt.

The second stay was lifted on May 22, 1987. In December 1988 a jury in Alabama awarded Olivier $507,340.00. On February 14, 1989 Olivier received a judgment against Merritt of $522,190.00, interest from the date of the judgment, and costs.

Due to the insolvency of both Merritt and its insurer, Midland, Olivier requested that the district court in Alabama issue writs of garnishment to LIGA, SCIGA, and the Alabama Insurance Guaranty Association [AIGA]. On July 21, 1989 the district court issued the writs.

AIGA, LIGA, and SCIGA are unincorporated associations created by state statutes. *See* Ala.Code §§ 27-42-1 *et seq.* (1975), La.Rev.Stat.Ann. §§ 22:1375 *et seq.* (West Supp.1991), S.C.Code Ann. §§ 38-31-01 *et seq.* (Law.Co-op.1976).[2] The AIGA writ is not at issue in this appeal. The guaranty

associations were established for the purpose of avoiding financial loss or excessive delay in payment to claimants or policyholders due to the insolvency of an insurer. *See* La.Rev.Stat.Ann. §§22:1376, 22:1382, S.C.Code Ann. § 38-31-60; *see also Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 676 (2d Cir. 1990). Insurance companies that underwrite risks in the state in which the guaranty association exists are required to pay assessments necessary to fund the guaranty association. *See* La.Rev.Stat.Ann. §§ 22:1380, 22:1382, S.C.Code An. §§ 38-31-40, 38-31-60. Prior to its liquidation, Midland was subject to assessments by LIGA and SCIGA. Pursuant to LIGA's and SCIGA's motions, on December 21, 1990 the district court in Alabama dismissed the writs of garnishment it had previously issued on the ground that the court lacked personal jurisdiction over the

garnishees. Olivier appeals the district court's order of December 21, 1990.

II. DISCUSSION

A. ALABAMA LONG ARM JURISDICTION

[1,2] This circuit conducts *de novo* review of a district court's dismissal of an action for lack of personal jurisdiction. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir.1990). We begin our inquiry into whether the district court properly refused to assert personal jurisdiction with a two-part analysis. First, we consider whether the district court could obtain personal jurisdiction over the defendants pursuant to the applicable state long-arm statute. Second, we consider whether the exercise of personal jurisdiction would violate the due process clause of the Fourteenth Amendment to the United States Constitution.

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B. DUE PROCESS

[3] The determination of whether a district court can exercise personal jurisdiction over a non-resident defendant is itself a two-part inquiry. In the first prong of our due process inquiry, we consider whether the defendants, LIGA and SCIGA, engaged in

minimum contacts with the State of Alabama. In the second prong of our inquiry, we consider whether the exercise of personal jurisdiction over the defendants would offend "traditional notions of fair play and substantial justice." *Madara*, 916 F.2d at 1516 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct 154, 158, 90 L.Ed. 95 (1945)).

1. Minimum Contacts

In analyzing the parties' arguments we are guided by the language of several recent Supreme Court opinions. As the Supreme Court has stated:

> [M]inimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute, and the process of resolving potentially conflicting "fundamental substantive social policies" can usually be accommodated through choice-of-law rules rather than through outright preclusions of jurisdiction in one forum. (citations omitted) *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 n. 26, 105 S.Ct. 2174, 2188 n. 26, 85 L.Ed.22d 528 (1985).

In 1989 Olivier, a resident of Louisiana, received a judgment in Alabama (the place where he sustained his injuries) against Merritt, a South Carolina corporation. Olivier contends that the judgment entitled him to proceed against Merritt's bankrupt insurer, Midland. Olivier maintains that his claim is a "covered claim" within the meaning of the Louisiana and South Carolina statutes governing the respective state insurance guaranty associations; Midland is an insolvent insurer and the claimant or insured was a resident of either Louisiana or South Carolina at the time of the insured event. *See* La.Rev.Stat.Ann. § 22:1379(3)(a)[3], S.C.Code Ann. § 38-31-20(6)[4].

Furthermore, Olivier argues that since his claim is a "covered claim", according to the respective statutes LIGA and SCIGA are deemed insurers to the extent of Midland's obligations. *See* La.Rev.Stat.Ann. §§ 22:1382

A(1) and (2)[5], S.C.Code Ann. §§ 38-31-60(a) and (b)[6].

Olivier contends that Midland is subject to personal jurisdiction in Alabama because it provided insurance coverage for Merritt for accidents that occurred while operating its vessel in Alabama waters. By guaranteeing payment of Midland's policies that provided insurance for claimants who are state residents or insureds who are state residents, Olivier contends LIGA and SCIGA should reasonably have foreseen that they would be subject to suit in other jurisdictions. Olivier claims that the statutes, which place LIGA and SCIGA in the position of an insolvent insurer, impose affirmative, extraterritorial obligations upon them. Because Midland is subject to personal jurisdiction in Alabama, Olivier argues that both LIGA and SCIGA are subject to personal jurisdiction in Alabama as well. Olivier argues that LIGA's and SCIGA's statutory

obligations establish minimum contacts with Alabama sufficient to justify the district court's exercise of personal jurisdiction over them.

As mere creations of their respective state statutes, LIGA and SCIGA claim they have not purposefully directed any activity toward the State of Alabama. Neither LIGA nor SCIGA maintains any offices or agents in Alabama. The associations contend that Midland's contacts with Alabama are not at issue since personal jurisdiction is not being sought after Midland, but after LIGA and SCIGA. LIGA and SCIGA claim that they will be denied due process if they are subject to legal liability in Alabama on account of the unilateral activity of a third party---Midland.

In addition, LIGA and SCIGA argue that although it might have been foreseeable that the associations could become involved in

litigation in Alabama, such foreseeability alone is insufficient to confer personal jurisdiction. LIGA and SCIGA maintain that foreseeability is only one factor to be considered in an analysis of a defendant's minimum contacts with a forum.

LIGA and SCIGA note that neither of the state insurance guaranty acts specifically authorizes suit against an insurance guaranty association outside the state which created the association. The associations argue that this conspicuous absence indicates that it was not the intent of the state legislatures to permit LIGA and SCIGA to be subject to suit in other jurisdictions.

In support of their arguments, LIGA and SCIGA rely upon the reasoning of the district court in *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 715 F.Supp. 94, 97 (S.D.N.Y.1989); *aff'd on other grounds*. 896 F.2d 674 (2d Cir.1990). We are not persuaded

by the court's reasoning in *Rhulen*. Indeed, we believe the district court decision concerning personal jurisdiction over AIGA and other state insurance guaranty associations is entitled to no weight since the Second Circuit held that the district court lacked subject matter jurisdiction; this holding precluded any consideration of the existence of personal jurisdiction over the defendants. *Rhulen*, 896 F.2d at 675-676.

For the reasons outlined below we believe Olivier has the superior argument. In the seminal case, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, the Supreme Court of the United States held that the due process clause of the Fourteenth Amendment requires that a defendant be subject to the personal jurisdiction of the court. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980). Thus, we recognize that

even if the forum state is the most convenient location for litigation, the due process clause may act to divest a state's courts of the power to render a valid judgment if a defendant does not have the requisite minimum contacts with the forum. *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. at 566; *Hanson v. Denckla*, 357 U.S. 235, 251, 254, 78 S.Ct. 1228, 1238, 1240, 2 L.Ed.2d 1283 (1958).

[4] The Supreme Court has opined that the due process clause of the Fourteenth Amendment requires that defendants have "fair warning" that particular activities may subject them to the jurisdiction of foreign sovereigns. *Burger King*, 471 U.S. at 472, 105 S.Ct. at 2182. One of the considerations important in assessing whether or not a defendant has fair warning is the foreseeability of suit within the jurisdiction. The foreseeability that is critical in an analysis of minimum contacts is whether "the defendant's conduct and connection

with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567. In attempting to define when a defendant should reasonably anticipate being haled into court, the Supreme Court has stated " . . . there must be some act by which the defendant purposefully availed itself of conducting activities within the forum state." *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1239-1240. This requirement exists to ensure that a defendant will not be subject to legal liability in a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Burger King*, 471 U.S. at 475, 105 S.Ct. at 2183.

[5] In the instant case, LIGA and SCIGA are subject to legal liability in Alabama neither on account of random contacts nor on account of the unilateral activity of Midland Insurance. We hold that the acts of

guaranteeing insurance obligations within the state and of assuming the role of insurer are of such a nature that they justify the legal fiction that LIGA and SCIGA have consented to service of process and suit in Alabama. *Cf. International Shoe*, 326 U.S. at 318, 66 S.Ct. at 159.

LIGA and SCIGA guaranteed payment of "covered claims". *See* La.Rev.Stat.Ann. § 22:1379(3)(a), S.C.Code Ann. § 38-31-20(6). The "claimant", Olivier, was a Louisiana resident. The "insured", Merritt, was a South Carolina corporation. The insurance company, Midland, was an "insolvent insurer" authorized to transact business in Louisiana and South Carolina at the time of Olivier's accident. In Alabama, the state in which he suffered injuries, Olivier received a judgment against Merritt. Because neither Merritt nor its insurer, Midland, could meet its obligations to the appellant, Olivier proceeded against the

associations that guaranteed payment.

Not only did LIGA and SCIGA guarantee payment of "covered claims", but they also assumed all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. *See* La.Rev.Stat.Ann. § 22:1382 A(2), S.C.Code Ann. § 38-31-60(b). By the language of the statutes that govern LIGA and SCIGA, we find that these associations had fair warning that they could be subject to suit for "covered claims" in jurisdictions outside of their respective states.

[6] LIGA and SCIGA assessed Midland in order to have sufficient funds to guarantee "covered claims". Midland insured Merritt's operations in Alabama. By serving as guarantors of Midland's obligation to Olivier, LIGA and SCIGA purposefully availed themselves of conducting activities within Alabama. Indeed, since the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355

U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957), it has been the law that when a party assumes insurance obligations in a state in which it has no other business, the party has submitted to the jurisdiction of the state's courts.

In reaching our conclusion we draw upon the holding of the Supreme Court of Alabama in *Keelean v. Central Bank of the South*, 544 So.2d 153 (Ala.1989). In *Keelean*, non-resident defendants guaranteed payment of a promissory note of a foreign corporation issued to an Alabama bank. Even though the defendants signed the guaranties outside of Alabama, the court held that the guarantors should have foreseen in the event of a default the effects of their guaranties in the State of Alabama. The court concluded that execution of the guaranties constituted sufficient minimum contacts required by the due process clause. *Keelean*, 544 So.2d at 157-158.

Moreover, other courts of appeals have reached conclusions similar to the one we reach today. In *Forsythe v. Overmyer*, 576 F.2d 779 (9th Cir.1978), *cert denied*, 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d. 174 (1978), the Ninth Circuit held that a non-resident third party's personal guaranty of a lease contract to be executed in California constituted minimum contact sufficient to subject the third party to the jurisdiction of California courts. *Forsythe*, 576 F.2d at 783-784. *See also National Can Corp. v. K Beverage Co.*, 674 F.2d 1134, 1137 (6th Cir.1982); *Marathon Metallic Bldg., Co. v. Mountain Empire Constr. Co.*, 653 F.2d 921, 923 (5th Cir. Unit A Aug. 1981).

We conclude that the associations' obligations to defend suits in other jurisdictions would not be unduly burdensome. Indeed, both LIGA and SCIGA may alleviate the cost of litigation in other jurisdictions by adjusting their insurance assessments. Or if

the expenses are too great, they have the option of altering their obligations and coverage for claims. *Cf. World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567.

2. Fair Play and Substantial Justice

[7] Once a court has decided that a defendant has established minimum contacts within a forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184. As the Supreme Court has stated, other factors may serve to establish the reasonableness of personal jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184. Some of these factors include: the plaintiff's interest in obtaining convenient

and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.*

In addition, as the Supreme Court of the United States has noted " . . . modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee*, 355 U.S. at 222-223, 78 S.St. at 201. The Supreme Court subsequently stated that the historical developments noted in *McGee* have only accelerated in the generation since that case was decided. *World-Wide Volkswagen*, 444 U.S. at 293, 100 S.Ct. at 565. By guaranteeing payment of an insurance claim that arose out of an accident in Alabama and that went to judgment within the State, LIGA and SCIGA engaged in economic

activity in Alabama. Due to the effects of their economic activity within the State, requiring LIGA and SCIGA to adjudicate in Alabama is not a substantial burden.

It would be unduly burdensome, however, to require Olivier to seek coverage for his claim from LIGA in Louisiana courts and from SCIGA in South Carolina courts. Such a requirement would spread thin his resources and would hamper Olivier's ability to obtain quick, convenient, and effective relief. *See McGee*, 355 U.S. at 223, 78 S.Ct. at 201. Indeed, it would frustrate the very purposes of the state insurance guaranty associations. *See e.g.* La.Rev.Stat.Ann. § 22:1376. Furthermore, a requirement that Olivier sue in both Louisiana and South Carolina would pose an unnecessary waste of precious judicial resources. Separate litigations do not necessarily insure fairness; in this case they would inhibit it.

III. CONCLUSION

For the reasons stated above we REVERSE the order of the district court and REMAND the case for further proceedings consistent with this opinion.

JOHNSON, Senior Circuit Judge, dissenting:

Prior to today, the particular issue in this case whether personal jurisdiction over an out-of-state insurance guaranty association is consistent with due process, had not yet been resolved by any United States Court of Appeals. As of today, the issue continued to await a correct resolution. In my opinion, the majority overrates the less-than-minimum contacts of LIGA and SCIGA to Alabama and further exacerbates this error by misconstruing the traditional notions of fair play and substantial justice. Olivier clearly fell short of his burden of justifying the exercise of personal jurisdiction over these non-profit

creatures of foreign state legislation. *See Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490 (5th Cir.1974) (the burden of proving personal jurisdiction is on the plaintiff).

1. *Minimum Contacts*

The majority finds sufficient minimum contacts in two acts taken by LIGA and SCIGA: (1) "guaranteeing insurance obligations *within the state* " of Alabama (emphasis added) and (2) "assuming the role of insurer." There are three flaws in the majority's finding. My first two objections relate to the majority's characterizations of the enabling statutes. My final criticism of the majority's finding of minimum contacts relates to its analytical focus.

First, the majority's assertion that LIGA and SCIGA guarantee "insurance obligations within" Alabama constitutes an imprecise interpretation of the statutes at issue because it implies that the statutes focus, at least to

some degree, on Alabama. In order for a claim to be "covered" under the statutes, either (1) the claimant or the insured must reside in the state which established the insurance guaranty association, or (2) the property giving rise to the claim must be permanently located in the state which established the insurance guaranty association. La.Rev.Stat.Ann. § 22:1379(3)(a) (West Supp.1991); S.C.Code Ann. § 38-31-20(6) (Law.Co-op.1990). Consequently, although it is technically true that LIGA and SCIGA guarantee insurance obligations within Alabama, they do so only because a covered claim could rise in *any* state, as long as one connection exists between the state which created the insurance guaranty association and either the plaintiff, the insured, or the property giving rise to the claim.[1]

Second, the majority's reliance on the provisions which mandate LIGA and SCIGA's assumption of the role of the insurer exalts

form over substance. *See* La.Rev.Stat.Ann. § 22:1382(A)(2) (West Supp.1991) ("The association shall [b]e deemed the insurer to the extent of its obligations on the covered claim . . . ."); S.C.Code Ann. § 38-31-60(b) (Law.Co-op.1990) ("The Association . . . is considered the insurer to the extent of its obligation on the covered claims . . . ."). These statutory provisions relate only to substantive insurance obligations; to interpret them as mandating that LIGA and SCIGA shall always be deemed or considered to be the insurer for purposes of personal jurisdiction attributes an unreasonably broad scope to these provisions.

Finally, the majority's minimum contacts analysis reflects an undue focus on foreseeability. *See ante* at 1557. Foreseeability ought not to be the sole focus of the due process analysis. Rather, this Court must also find that LIGA and SCIGA

"'purposefully directed'" their activities at Alabama. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2181, 85 L.Ed.2d 528 (1985). *I.e.*, LIGA and SCIGA must have "'purposely derive[d] benefit'" from their Alabama contacts, *id.* at 473, 105 S.Ct. at 2183, or "manifestly . . . availed [themselves] of the privilege of conducting business [in Alabama] shielded by 'the benefits and protections' of [Alabama] laws," *id.* at 476, 105 S.Ct. at 2184. The contacts relied on by the majority clearly fail to establish such purposeful availment by LIGA and SCIGA. Rather, those contacts are "'random, fortuitous,' [and] 'attenuated,'" *id.* at 475, 105 S.Ct. at 2183. (citations omitted), and, as such, they are insufficient to justify an exercise of personal jurisdiction.[2] Furthermore, fairly read, these provisions indicate an intent to bestow benefit upon only in-state claimants and insureds, thus negating

any inference that LIGA and SCIGA purposefully subjected themselves to the benefits of Alabama law.

The remainder of the majority's evaluation of minimum contacts further obfuscates the purposeful availment requirement. The majority asserts that, because both LIGA and SCIGA assessed dues against Midland and Midland insured a risk in Alabama, purposeful availment exists under the reasoning of *McGee v International Life Insur. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), involving a defendant who was a primary insurer, and four other cases involving defendants who were private guarantors. All of those cases, however, are clearly distinguishable from the one at bar. First, in all five cases, the defendant was aware that an occurrence of the insured risk or a default on the guaranteed note would have effects in the forum state. *See McGee*, 355 U.S. at 223, 78 S.Ct. at 201;

National Can Corp. v. K Beverage Co., 674 F.2d 1134, 1137 (6th Cir.1982); *Marathon Metallic Bldg. co. v. Mountain Empire Constr. Co.*, 653 F.2d 921, 923 (5th Cir. Unit A Aug. 1981); *Forsythe v. Overmyer*, 576 F.2d 779, 781-83 (9th Cir.), *cert. denied*, 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978); *Keelean v. Central Bank of the South*, 544 So.2d 153, 157 (Ala. 1989). In the case *sub judice*, it was merely foreseeable rather than actually foreseen that, if Midland generated a covered claim, it could arise in Alabama. Moreover, in all but one of the majority's cases, the court attributed a profit-motive to the establishment of contacts with the forum state by the defendant, a private person or entity. *See McGee*, 355 U.S. at 221-23, 78 S.Ct. at 200-01; *National Can*, 674 F.2d at 1137; *Marathon Metallic*, 653 F.2d at 923; *Forsythe*, 576 F.2d at 781-83.[3] Unlike the cases relied on by the majority, the case at

bar involves non-profit creatures of statute,[4] formed solely to aid beneficiaries of policies issued by insolvent insurers,[5] in which membership is compulsory for insurers who wish to do business in the state that created the insurance guaranty association,[6] whose funds are derived solely from premiums written in the state which created the association,[7] and whose assessments against member insurers do not reflect an evaluation of risk, but rather are simply proportional to the particular member's share of the total amount of premiums written in the state that created the association.[8] Because the insured in this case, Merritt, was a South Carolina corporation, a portion of the premiums it paid to Midland went toward funding SCIGA---*i.e.*, SCIGA received funding directly related to the insurance policy that covered the Alabama tort which gave rise to the instant action. LIGA, however, received no additional funds as a

result of the policy at issue in this case although it did benefit to the extent that Midland paid LIGA a portion of its premiums from Louisiana insureds, but those Louisiana insureds have absolutely no connection to this litigation. Neither SCIGA nor LIGA can be said to have purposefully availed themselves of the benefits of Alabama law merely by receiving money from Midland, who coincidentally insured the Alabama tort; this money in no way reflected an evaluation of the Alabama risks under the Merritt policy or an effort to profit from Midland's insurance of risks in Alabama.

Moreover, the priority provisions of the guaranty statutes (which the majority ignores) also negates a finding of purposeful availment. These provisions specify, in cases where more than one guaranty association may be liable, from which association the claimant must seek recovery first. La.Rev.Stat.Ann. § 22:1386(B) (West Supp.1991); S.C.Code Ann.

§ 38-31-100(2) (Law.Coop.1990).[9] Olivier argued that these provisions clearly imply that LIGA and SCIGA anticipated being haled into foreign fora. The more likely explanation, however, posits that LIGA and SCIGA expected that the claimant would exhaust his remedy against the association that is required to be sued first in its state's forum, then pursue a remedy against the next association in its state's forum and so on. Rather than purposeful availment, the priority provisions indicate a desire on the part of LIGA and SCIGA to be sued only in their own fora.

I therefore believe that LIGA and SCIGA lack minimum contacts with Alabama.

2. *Fair Play and Substantial Justice*

Olivier would still be entitled to a reversal, notwithstanding his insufficient showing on the minimum contacts prong, if he had made an exceptionally strong showing that an exercise of personal jurisdiction over LIGA

and SCIGA would be consistent with fair play and substantial justice. *Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1034-35 (11th Cir.1991). This he failed to do. Fair play and substantial justice connote five factors: (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests of the several states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 476-77, 105 S.Ct. at 2184-85.

In the case at bar, the first and fifth factors converge and weigh heavily against the majority's holding. The majority asserts that any burden placed on the insurance guaranty associations and the social policy they serve may be alleviated by raising assessments or

reducing coverage of claims. *See ante* at 1559.[10] The majority further claims that Olivier's interest (the third factor) and the fifth factor are intertwined such that a failure to find personal jurisdiction over LIGA and SCIGA will "frustrate the very purposes of the state insurance guaranty association." *See ante* at 1559. The majority underestimates the scope and magnitude of the effect its holding will have on insurance guaranty associations. As non-profit creatures of statute designed to benefit in-state claimants and insureds, they will have to raise relatively substantial sums of money, in what may become a large number of cases, to hire attorneys in foreign jurisdictions and pay other costs of defense in foreign fora. The social goal of aiding claimants and insureds of insolvent insurers will be disserved, and perhaps even defeated, by forcing the guaranty associations to expend a large share of their

resources defending in foreign fora rather than actually satisfying covered claims.

Returning to the plaintiff's interest in obtaining convenient and effective relief, the majority is unwilling to force Olivier to pursue his claims in Louisiana (his home state) and South Carolina. However, such litigation is not likely to be significantly more difficult or costly in those fora because the issues are primarily of a legal rather than a factual nature. Furthermore, unless SCIGA fails to satisfy all of Olivier's allegedly covered claim, he will have to litigate in only one forum.[11] Perhaps the majority means to adopt Olivier's argument that, unless the court below has personal jurisdiction over appellees, he could be faced with a denial of coverage by each association in its own state courts. The fatal flaw in this argument is that it assumes that the court below will decide questions of Louisiana and South Carolina law contrary to

the way the Louisiana and South Carolina courts would. Surely, Olivier cannot have a legitimate interest in a forum based on the possibility that it will decide questions of foreign law erroneously.[12] Indeed, his only legitimate interest is in the efficiency of obtaining relief *if* it is due, not in obtaining a more favorable holding on the substantive law. *Burger King*, 471 U.S. at 477, 15 S.Ct. at 2184.

Harking back to the second factor, which the majority ignores, Alabama, the forum state, possesses only a relatively minor interest in supplying the forum for this case. The underlying tort occurred and was reduced to judgment in Alabama, but all the parties to the tort action and the garnishment action (with the exception of the Alabama Insurance Guaranty Association) hail from outside Alabama.

Finally, the interstate judicial system's interest in obtaining the most efficient

resolution of controversies might weigh in favor of a finding of personal jurisdiction in this case because judicial resources might be saved if Olivier were not faced with the *possibility* of having to seek garnishment against AIGA, LIGA, and SCIGA in three different fora to obtain complete satisfaction of his covered claim. However, this judicial efficiency argument squarely depends on Olivier's being unable to satisfy in full his allegedly covered claim against SCIGA.[13] This contingent interest in judicial efficiency cannot justify an exercise of personal jurisdiction in light of Olivier's insufficient showing on the other requirements of due process in the realm of personal jurisdiction.

For the foregoing reasons, I dissent.

FOOTNOTES

JOHN W. PECK, Senior, Senior Circuit Judge:

* *See* Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

** Honorable John W. Peck, Senior U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

2 Property and liability guaranty funds, such as AIGA, LIGA and SCIGA, have been established by law in each of the fifty states, the District of Columbia, Puerto Rico and the U. S. Virgin Islands. Most of these laws are based on the "Post-Assessment Property and Liability Insurance Guaranty Association Model Act" adopted by the National Association of Insurance Commissioners in December, 1969. *See generally Referenced Handbook on Insurance Company Insolvency*. 459 *et seq*. (Richard J. Marcus, ed., 2d ed. 1989).

3 The text of this section after amendments in 1987 does not differ materially from the text as it existed at the time of Olivier's accident and the date of insolvency of Midland Insurance. The current text reads as follows:

> "Covered claim" means an unpaid claim, including one for unearned premiums by or against the insured or agent, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance

policy to which this Part applies issued by an insurer, if such insurer becomes an insolvent insurer after September 1, 1970, and; (i) The claimant or insured is a resident of this state at the time of the insured event; or (ii) The property from which the claim arises is permanently located in this state.

4 For the sake of brevity, where the South Carolina statutes governing SCIGA do not contain any important differences from the Louisiana statutes governing LIGA, we have omitted from this opinion the texts of the South Carolina statutes.

5 The relevant portions of these sections read as follows:

A. The association shall:

(1)(a) Be obliged to the extent of the covered claims . . . .

(2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent.

6 S.C.Code Ann. § 38-31-60(b) corresponds to LA.Rev.Stat.Ann. § 22:1382 A(2). The first sentence of the paragraph in the South Carolina Code is virtually identical to its Louisiana counterpart. The South Carolina Legislature, however,

added the following to paragraph (b) of § 38-31-60:

> However, the Association has the right but not the obligation to defend an insured who is not a resident of this State at the time of the insured event unless the property from which the claim arises is permanently located in this State in which instance the Association does have the obligation to defend the insured.

JOHNSON, Senior Circuit Judge:

1 Indeed, this portion of the majority's reasoning smacks of the "stream of commerce" theory of minimum contacts that was rejected by a plurality of the Supreme Court in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 108-13, 107 S.Ct. 1026, 1030-33, 94 L.Ed.2d 92 (1987).

2 In its discussion of fair play and substantial justice, the majority evidently refers to those contacts again when it asserts that LIGA and SCIGA engaged in "economic activity" in Alabama which had "effects" in Alabama. *See ante* slip opinion at 1500. LIGA and SCIGA engaged in no economic activity of any sort in Alabama. Further, the only effect that actions by LIGA and SCIGA may have had in Alabama is their own liability for the judgment obtained against Merritt in Alabama, and that is not an "effect" relevant to personal jurisdiction. The majority does not, and cannot, point to any sort of reliance induced or any other kind of effect in Alabama. LIGA and SCIGA

simply have had no meaningful impact on Alabama.

3 In the remaining case, *Keelean*, there was no finding regarding the defendants' collective motive behind providing the guaranty even though such a motive may legitimately be attributed to every private guarantor. Instead, the Alabama Supreme Court rested its holding, that the exercise of personal jurisdiction did not violate due process, on a flawed interpretation of *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). The *Keelean* court held that *Calder* established an "effects test" under which the exercise of personal jurisdiction is proper where the defendants should have foreseen the possible effect in the forum state in the event of a default on the guaranteed note. 544 So.2d at 157. However, the so-called 'effects test' described in *Calder* is much narrower and is applicable to neither *Keelean* nor the case at bar. The *Calder* court held that where defendants allegedly commit the *intentional* tort of libel, "expressly aimed at" a plaintiff in the forum state, *knowing* that the libelous material will have its greatest distribution in the forum state, the exercise of personal jurisdiction is justified. 465 U.S. at 789-90, 104 S.Ct. at 1486-88. Thus, the *Keelean* case is inapposite.

4 La.Rev.Stat.Ann. § 22-1380(A) (West Supp. 1991); S.C.Code Ann. § 38-31-40 (Law.Coop.1990).

5 La.Rev.Stat.Ann. § 22:1376 (West 1978); *see* S.C.Code Ann. §§ 38-31-60(b), 60(b) (Law.Co-op.1990).

6 La.Rev.Stat.Ann. § 22:1380(A) (West Supp. 1991); S.C.Code Ann. § 38-31-40 (Law.Co-op.1990).

7 La.Rev.Stat.Ann. §§ 22:1379(b)(6), 1382(A)(3)(a)(i) (West Supp.1991); S.C.Code Ann. § 38-31-20(9), 38-31-60(c)(iii) (Law Co-op.1990).

8 La.Rev.Stat.Ann. § 22:1382(A)(3)(a)(i) (West Supp.1991); S.C.Code Ann. § 38-31-60(c)(iii) (Law.Coop.1990).

9 The Louisiana and South Carolina provisions are identical.

10 Note that the majority erroneously considered this factor under the rubric of minimum contacts rather than reasonableness.

11 The priority provisions dictate that Olivier should seek coverage first from SCIGA because the insured, Merritt, was a South Carolina resident. *See* La.Stat.Ann. § 22:1386(B) (West Supp.1991); S.C.Code Ann § 38-31-100(2) (Law.Coop.1990).

12 *Cf. Burger King*, 471 U.S. at 483 n. 26, 105 S.Ct. at 2188 n. 26 (any conflict between state social policies should be resolved by choice of law principles; such conflict will not render an exercise of personal jurisdiction unreasonable).

13 *See supra* note 11.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SHERMAN J. OLIVIER,	*	
	*	
Plaintiff,	*	CIVIL ACTION NO.
	*	
vs.	*	84-0890-B
	*	
MERRITT DREDGING CO., INC.,	*	
	*	
Defendant.	*	

ORDER

This matter is before the Court on the plaintiff's motion to reconsider this Court's order dismissing garnishees Louisiana Insurance Guaranty Association (LIGA) and South Carolina Property and Casualty Insurance Guaranty Association (SCGA). Upon reconsideration, it is hereby ORDERED that the Court's order of April 30, 1990, be and hereby is hereby VACATED and this order be SUBSTITUTED in its place.

Background

On July 21, 1989, writs of garnishment were

issued against LIGA and SCGA pursuant to affidavits filed by counsel for plaintiff Sherman J. Olivier (Olivier) alleging that the garnishees were believed to be indebted to defendant Merritt Dredging Company, Inc. (Merritt) or to have effects of Merritt in its possession or control.

This garnishment action arises from a personal injury suit filed by Olivier, against his former employer, Merritt, for injuries which he incurred on board a Merritt vessel during dredging operations on the Alabama River. Olivier, a resident of Louisiana was a seaman on the vessel at the time of his injury. On December 7, 1988, a jury returned a verdict in this case in favor of the plaintiff. On February 14, 1989, the Court entered final judgment in favor of the plaintiff in the sum of $522,190.00.

After the commencement of this action, but prior to trial, both Merritt and its insurer,

Midland Insurance Company (Midland), were placed in bankruptcy. At trial Merritt was represented by its excess insurer which has subsequently settled from this action. According to the plaintiff, an outstanding judgment amount of $469,645.95 remains. Consequently, the plaintiff has filed garnishments against both LIGA and SCGA under the theory that a portion of Midland's premiums were paid to them to protect claimants from the insurance company's insolvency. According to the plaintiff, both LIGA and SCGA are liable to Olivier as a claimant to insurance proceeds owed by Midland on behalf of Merritt as a result of the judgment in this action. Both LIGA and SCGA have filed motions to dismiss on the ground that this Court lacks personal jurisdiction over them.

LEGAL DISCUSSION

The burden of establishing jurisdiction is upon the party seeking to invoke the federal court's jurisdiction. Product Promotions, Inc.

v. Cousteau, 495 F.2d 483 (5th Cir. 1974). In most instances, determining whether the court has in personam jurisdiction requires a two-part analysis. First, the court must determine whether the defendant's actions meet the requirements of the forum state's long-arm statute. If not, the Court has no jurisdiction because service of process cannot be achieved and the inquiry ends. If the defendant's actions do satisfy the statutory requirements, then the court must consider whether the statute goes beyond the permissible limits of state jurisdiction over nonresident defendants set forth in International Shoe Co v. Washington, 326 U.S. 310 (1945), and its progeny. Prejean at 1264.

Alabama courts have abandoned this two-step analysis through their interpretation of the state's long-arm statute. Hales v. First Appalachian Corporation, 494 F.Supp. 330 (N.D.Ala. 1980). The Alabama Supreme Court has

held that service of process and, therefore, personal jurisdiction, is "as broad as the permissible limits of due process. Alabama Weatherproofing Co., Inc. v. Hanby, 431 So.2d 141 (Ala. 1983). Thus, under Alabama law the court must engage only in a single-step analysis to determine whether personal jurisdiction exists; that is, "whether the assertion of jurisdiction meets federal due process standards." MacKinnon v. St. Louis Southwestern Railway, 518 So.2d 89, 91 (Ala. 1987).

In International Shoe, the Supreme Court held that it would be a violation of due process to bring a person into a forum with which he has established no meaningful ties. In that case the Court set forth the guiding principle of analysis in personal jurisdiction cases. The Court held that in order for a court to exercise personal jurisdiction over a defendant, that person must have "minimum contacts" with the forum such that the exercise of jurisdiction

over him "does not offend traditional notions of fair play and substantial justice." Id. at 316.

The plaintiff contends that the contacts the Court should consider in this case are those between the insurer, Midland Insurance, and the forum. According to Olivier, personal jurisdiction over Midland Insurance is equivalent to personal jurisdiction over LIGA and SCGA because guaranty associations "stand in the shoes" of their insolvent insurers. The plaintiff cites several cases to support his contention that this Court has personal jurisdiction over Midland Insurance. Personal jurisdiction over Midland, however, is not in issue. The issue is whether LIGA and SCGA have sufficient minimum contacts with this jurisdiction.

One factor in determining the type of contacts which meet the International Shoe requirements is foreseeability. The defendant's conduct or connection with the forum must be

such that he could "reasonably foresee being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Court does not find it reasonably foreseeable that a state-
created agency such as LIGA or SCGA would be subject to suit in a foreign jurisdiction absent specific statutory authority. Plaintiff suggests that it is reasonably foreseeable that a claim against an insolvent insurer may arise in another state. That, however, is not the type of foreseeability dictated by World-Wide Volkswagen. The question is whether the garnishees in this matter could reasonably foresee being haled into court in this jurisdiction.

In light of the purpose and function of state guaranty associations, it would be illogical to assume that the creators of LIGA and SCGA contemplated that those agencies would be subject to jurisdiction in foreign forums.

In Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F.Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2nd Cir. 1990) the plaintiff filed suit against twenty-six state insurance guaranty associations such as LIGA and SCGA. The court, holding that it lacked personal jurisdiction over out-of-state insurance guaranty associations, noted:

> The defendants [guaranty associations of various states] for the most part exist under statutory provisions derived from the "Post Assessment Property and Liability Insurance Guaranty Association Model Act," adopted by the National Association of Insurance Commissioners. The various states have established different statutory versions of this Model Act. While the applicable statutes may vary considerably, both in format and the local construction attributed to the specific words, the essential premise upon which all defendants operate is for our purposes identical. They provide statutory benefits to those holders of policies issued within the state by insurers which thereafter failed.

Id. at 96, 97.

Both LIGA and SCGA cover only claims against an insolvent insurer if the insurer is authorized to transact business in the state and the claimant or insured is a resident of the state or the property that is the subject of the claim is permanently located in the state. La. Rev. Stat. Ann. § 22:1379 (West 1978); S.C. Code Ann. § 38-31-10 (Law. Co-op. 1976). Furthermore, these guaranty associations are funded by insurance companies as a condition of their authority to transact business within the state. La.Rev.Stat.Ann § 22:1382 (West 1978); S.C. Code Ann. § 38-31-40 (Law. Co-Op. 1976).

Another minimum contacts requirement is that the defendant must purposefully avail himself of the privilege of conducting activities within in the forum or purposely direct his activities at the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 474 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

The garnishees in this action cannot be said to have purposefully availed themselves of the privilege of conducting business in this state, nor can they be said to have purposely directed activities at the forum.

This is especially true in light of the fact that LIGA and SCGA are statutorily-created entities. Their duty, if any, to the plaintiff arises only from state law. As the court in Rhulen noted:

> The guaranty associations have no privity of contract with [the plaintiff] or with the named insureds. Their duty is statutory only... Nothing in the Model Act or in any of the local state acts has been brought to our attention which would evidence any intent of these guaranty associations or the respective legislatures which created them to subject their operations to the long-arm jurisdiction of some other state.

Id. at 96, 97.

Based on the plaintiff's failure to establish proof that the garnishees have sufficient minimum contacts with this forum to

satisfy the due process requirements of International Shoe and its progeny, the Court finds that it lacks personal jurisdiction over the movants. Accordingly, it is

ORDERED that the motions to dismiss garnishment filed by the Louisiana Insurance Guaranty Association and by the South Carolina Guaranty Association be and hereby are GRANTED.

DONE this the 19th day of December, 1990.

(signed) Charles R. Butler, Jr.
UNITED STATES DISTRICT JUDGE

(Date stamped: DEC 21 1990)

Appendix D

UNITED STATES CONSTITUTION

AMENDMENT XIV, SECTION. 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

La. Rev. Stat. Ann. § 22:1377. Scope.

This Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance.

Appendix F

La. Rev. Stat. Ann. § 22:1379. Definitions.

As used in this Part:

. . .

(3) "Covered claim" means an unpaid claim, including one for unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Part applies issued by an insurer, if such insurer becomes an

insolvent insurer after September 1, 1970 and (a) the claimant or insured is a resident of this state at the time of the insured event; or (b) the property from which the claim arises is permanently located in this state. "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.

. . .

Appendix G

La. Rev. Stat. Ann. § 22:1380. Creation of the association.

There is created a nonprofit unincorporated legal entity to be known as the Insurance Guaranty Association, whose domicile for purpose of suit shall be East Baton Rouge Parish, Louisiana. All insurers defined as member insurers in R.S. 22:1379 shall be and remain members of the association as a condition of their authority to transact insurance in this state. The association shall perform its function under a plan of operation established and approved under R.S. 22:1388 and shall exercise its powers through a board of directors established under R.S. 22:1381.

Appendix H

La. Rev. Stat. Ann. § 22:1382. Powers and duties of the association.

(1) The association shall:

(a) Be obligated to the extent of the covered claims existing prior to the

determination of the insurer's insolvency, or arising after such determination but prior to the first to occur of the following events: (1) expiration of thirty days after the date of such determination of insolvency, (2) expiration of the policy, or (3) replacement or cancellation of the policy at the instance of the insured if he does so within thirty days of the determination, but such obligation shall include only that amount of each covered claim, except return premiums, which is in excess of one hundred dollars and is less than fifty thousand dollars, nor shall a claim for the portion of unearned premiums in excess of seven hundred and fifty dollars be allowed. Notwithstanding the foregoing, the association shall pay the full amount of any covered claim arising out of a workmen's compensation policy. In no event shall the association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

(b) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent.

(c)(1) Assess insurers amounts necessary to pay the obligations of the association under Paragraph (a) subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, and the cost of examinations under R.S. 22:1388 and other expenses authorized by this Part. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year, whether or not a company withdraws subsequent to the preceding calendar year, bears to the net direct written premiums

of all member insurers for the preceding calendar year. Each member insurer shall be notified of the assessment not later than thirty days before it is due. No member insurer may be assessed in any year an amount greater than one percent of that member insurer's net direct written premiums for the preceding calendar year.

. . . .

(2) The association may:

. . . .

(c) Sue or be sued.

Appendix I

La. Rev. Stat. Ann. § 22:1383. Plan of operation.

(1)(a) The association shall submit to the commissioner a plan of operation and any amendments thereto necessary or suitable to assure the fair, reasonable and equitable administration of the association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the commissioner.

Appendix J

La. Rev. Stat. Ann. § 22:1386. Nonduplication of recovery.

. . .

(2) Any person having a claim which may be recovered under more than one insuran

guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this Part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.